

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Boating and Ocean Recreation
Honolulu, Hawaii 96813

May 09, 2008

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

DENIAL OF REQUESTS FOR CONTESTED CASE
HEARINGS BY BRUCE MIDDLETON AND JANET MANDRELL

The petitioners requested a contested case hearing concerning amendments to the Hawaii Administrative Rules as they pertain to vehicle parking in the State small boat harbor facilities. We request that the Board confirm the Chairpersons denial of the petitions for contested case hearing filed by Bruce Middleton and Janet Mandrell that were received at the January 25, 2008 Land Board Meeting.

BACKGROUND

On January 25, 2008, DOBOR brought a request to the Board for final approval of amendments to DOBOR's rules relating to parking at DOBOR facilities. As part of that same agenda item, DOBOR also recommended that the Board deny petitions for contested cases that had been filed by three individuals, Arnold Lum, Garry Kaaihue, and Melissa Malulani Ling-Ing. During the course of the meeting, Bruce Middleton and Janet Mandrell orally requested contested case hearings which were later followed up by requests in writing, Exhibit "A" and Exhibit "B" respectively.

At the January 25, 2008 meeting, the Board denied the requests for contested case hearings from Arnold Lum, Garry Kaaihue, and Melissa Malulani Ling-Ing, based on their lack of standing. After receipt of the written petitions from Bruce Middleton and Janet Mandrell, the Chairperson similarly issued denials for those petitions for a contested case. These letters are attached as Exhibits "C" and "D" respectively. Upon review of the minutes we find that the Board had not included these petitions in its denial of the other petitions for contested cases. Similar to the prior petitions that were denied, Mr. Middleton and Ms. Mandrell have failed to show that they have standing to require a contested case in this matter.

A contested case hearing is one where the "legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing." HRS §91-1(5). The phrase "required by law" "embraces both constitutional [and]

statutory law." Bush v. Hawaiian Homes Comm'n, 76 Hawai'i 128, 134-35, 870 P.2d 1272, 1278-79 (1994).

A rule is defined as an "agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency." HRS §91-1(4). Rule making does not affect the rights, duties, or privileges of particular persons that would require a contested case hearing to be held. "Rule-making is an agency action governing the future conduct either of groups of persons or of a single individual; it is essentially legislative in nature, not only because it operates in the future, but also because it is concerned largely with considerations of policy." In re Hawaiian Electric Co., Inc., 170 P.U.R.4th 395, 466, 918 P.2d 561, 566 (1996). "Adjudication, conversely, is concerned with the determination of past and present rights and liabilities." Id. "What distinguishes legislation from adjudication is that the former affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it; while adjudication operates concretely upon individuals in their individual capacity." Id., 170 P.U.R.4th at 466-7, 918 P.2d 561, 568-9.

A rule making procedure is, by its nature, not subject to a contested case hearing. Rule making does not affect the legal rights, duties, or privileges of individuals but is instead a vehicle for legislative like policy making by an administrative agency. As such, no individual has a right to a contested case in the course of rule making proceedings.

Based on the above, DOBOR asserts that the petitioners are not entitled to a contested case hearing arising out of a rule making proceeding.

RECOMMENDATION

That the Board ratify the actions of the Chairperson and deny the petitions for a contested case hearing filed by Bruce Middleton and Janet Mandrell based on lack of standing.

Respectfully submitted,



Edward R. Underwood
Administrator

APPROVED FOR SUBMITTAL:



Laura H. Thielen
Chairperson and Member

BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

1. **Name: Bruce M. Middleton (Petitioner/Plaintiff) Phone 941-0875 FAX Same**
2. **Address: 1848 Kahakai Dr. #903 Honolulu, HI 96814**
Email Address: middle001@aol.com
3. **Attorney: (if any) Pro Se**
4. **Address: N/A**
5. **Subject Matter: HAR 13-233 rule changes and related DLNR/DOBOR misfeasance; Violation by DLNR of Plaintiff's due process rights under State Constitution; wrongful impingement of Plaintiff's property interests in Ala Wai Harbor berthing and parking facilities.**
6. **Date of Public hearing/BLNR Meeting: Public Hearing 19 December 2007; BLNR Meetings on 27 July 2007 and 25 January 2008**
7. **Legal authority under which hearing, proceeding or action is being made: (a) HRS Chapter 91 (HAPA); (b) applicable DLNR Chapter 13 Administrative Rules and (c), case law flowing from decisions of the Supreme and Appellate Courts of the State of Hawaii.**
8. **Nature of your specific legal interest in the above matter, including tax map key of property affected: (a) Property and recreational interests as slip and parking permit holder, Berth 45, Ala Wai Small Boat Harbor, Honolulu, HI, TMK23037012; (b), Violation of constitutional right to due process both as an individual and as member of a specifically afflicted class or group, to wit, those holding a DLNR/DOBOR vessel berthing and automobile parking permits within the Ala Wai Harbor.**
9. **Specific disagreement, denial or grievance with the above matter:**
That in terms of both process and substantive issues:
(a), the Land Board, based on DOBOR and Departmental malfeasance, misinformation, and willful omission of material fact, was fraudulently misguided into initially authorizing Subject rule change package, and subsequently, into approving it without amendments responsive to, or consistent with, written and oral public testimony as is required by law;

(b) that the process having been perverted by Departmental misfeasance and DOBOR's malfeasance, the Land Board erroneously approved a provision therein establishing a new parking fee rate structure, which is excessive, arbitrary, capricious, legally improper, and which will work great hardship and injustice on the plaintiff and other members of the State Boating Program, and which will further, in a more general sense,

(c) have a deleterious effect on the Boating Program as a whole to the detriment of its stakeholders, including Plaintiff;

d) that the new rules approved by the Land Board on the basis of falsehoods conveyed by DOBOR's Administrator and abetted by the Department's failure to properly supervise DOBOR's submittal and presentation, would, if implemented, make it unreasonably difficult to enjoy fishing, cruising and sailing activities by making parking costs prohibitively expensive to guests and crew members, the effect being to dampen rather than to encourage "the landing of fish" and public ocean recreation as mandated by State statutory and constitutional law;

(e) that the Hawaii Yacht Club (HYC), a recreational, cultural, financial and public service asset to all Harbor stakeholders, including Plaintiff, will be so badly impacted by new rules, which would authorize commercialized parking throughout the Harbor, that its revenue producing operations and, indeed, its very existence will be threatened;

(f) that the fee-setting model used by DOBOR to establish new parking fees within the Harbor, namely an equivalency with that paid by City and County employees for off-street parking in downtown Honolulu, is arbitrary, capricious, unjust, and unlawful inasmuch as it is unsupported and unauthorized by statutory law under HRS Chapter 200.

(g), that the use of such a model for fee setting is contrary to DLNR's own policies and historical practices, which said agency is legally bound to observe;

(h), that to increase fees originally instituted to defray the cost of providing a specific service, (in this case the cost of administering a boaters-only parking program for slip holders) to pay, as the Administration itself says it intends to do, for other operational activities, such as salary costs for another DLNR Division, DOCARE, (about \$1.8 million per year for 21 positions from the BSF), or dredging operations in a harbor on Maui, would be an abuse of Departmental authority detrimental to the Plaintiff and other boaters, and which, furthermore, is unlawful *per se* because it is not supported or authorized by statutory law:

(i) the Department, and the Land Board acting at the hands of the Department, failed, as required by law, to properly consider the public testimony received during the State-wide public hearings and at the Land Board Meeting of 25 January 2008;

(j) that the rule change package approved by the Land Board on 27 July 2007, was significantly modified before subsequently being brought to the Land Board for final approval on 25 January 2008, this action being contrary to the provisions of HRS Chapter 91, requiring under such circumstances that the rule change process, if continued, begin *de novo*;

(k) that the rule change package fails to meet necessary legal requirements for specificity as to precisely what hourly fees will be charged by the Harbor's parking meters, or elsewhere in the Harbor under concessionaire operation, as it simply states that City and County rates shall apply while, in fact, C&C has many different rates for different geographical areas and purposes. This lack of specificity means that (1), any fee subsequently instituted will be unlawful since it will involve a high-impact process of discretionary decision making and fee selection which will have the effect of circumventing the requirements of HRS Chapter 91, and which will, for this and other reasons, constitute an abuse of authority and violation of HAPA by the DLNR and Department; and (2), the entire DLNR/DOBOR rule change process up to this point has been conducted in violation of the HAPA inasmuch as both the Land Board and affected Harbor stakeholders have been, and continue to be, deprived of critically important information as to DLNR/DOBOR's true intentions for specific fee charges expressed in meaningful terms, such as specific dollar costs. So long as such critical information is withheld by the Department, as it now is, Public Hearings under HRS Chapt. 91 and deliberative consideration of the rule changes by the Land Board are transmogrified by DLNR *malfeasance* into little more than pro forma window dressing for government administration by diktat¹;

(l) the deliberative process of the Land Board was further corrupted, to the detriment of due process, when during the meeting of 25 January 2008, the Chairperson wrongfully misinformed the Board that for legal or procedural reasons, not further specified, the Board did not have the authority to, or otherwise could not, reject the Package and require that the Department (DOBOR) first produce a parking plan for the Harbor. Plaintiff challenges this act on three grounds: *First* the Chair's assertion it is utterly false, there being no such requirement or prohibition rooted either in law or in

¹ See Intermediate Court of Appeals Decision of 31 December 2007: MELVIN T. TANAKA, JAMES WATT, MASAICHI TAKAKI, and DEXTER EGDAMIN, Plaintiffs-Appellants, v. STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES ("DLNR"); ROES GOVERNMENTAL UNITS OR ENTITIES 1-10, *Civ. No. 04-1-0357*

administrative rules; *second*, that this falsehood clearly deterred the Board from its duty and natural inclination to act with justice and equity in the interest of the State and the people of Hawaii; and *third*, that the Chairperson, contrary to the usual and customary standards of parliamentary procedure, failed to act properly as presiding officer of the Board in that she failed to remain neutral during discussions, but instead took a position of clear-cut advocacy by which act the Board's deliberative process was perverted, justice miscarried, and due process denied.

(m) that it was only after the legally mandated public hearings in December 2007, that DOBOR came up with anything resembling a parking plan for the Harbor which the rule change package was intended to implement. Since this critical information was withheld from Plaintiff and other affected stakeholders throughout the public hearing process, all were consequently deprived of a meaningful capacity to judge the full effects of the proposed rule changes which, in turn, effectively renders the public hearings utterly worthless in terms of HRS Chapter 91 requirements, and which constitutes an astonishing example of administration by ambush and slight of hand.

10. Outline of specific issues to be raised: Plaintiff's intention is to raise all the issues set forth above and in the following sections below.
11. Outline of basic facts:

During the period from January through February 2007, or thereabouts, DOBOR, at the behest of then DLNR Chair Peter Young, held three evening informational meetings, to receive public input concerning the possibility of instituting commercially operated paid parking throughout the Ala Wai Harbor. The meetings were well attended and at all three, the idea of such commercial parking was overwhelmingly and vehemently opposed by surfers, paddlers, area residents, and boaters alike.

During the Spring of 2007, DOBOR sent out approximately 600 questionnaires to Ala Wai boaters in their monthly billing statements, asking whether or not they approved of *controlled parking* within the Harbor. What "controlled parking" meant was not explained by DOBOR either in the questionnaire or elsewhere. Approximately 20% of the questionnaires were subsequently returned and, according to DOBOR, of these, only about 60% replied in favor of "controlled parking." This meant that, by way of its questionnaire, DOBOR received an affirmative response from only 12% or so of the Harbor's slip-holders.

For the next several months nothing more was heard from DOBOR about possible parking changes at any of the several DOBOR-sponsored meetings

with Ala Wai boaters held at the Hawaii Yacht Club, or at any other time, and because of this, and in further consideration of the fact that public opposition had been so vocal at the public meetings, most boaters logically concluded that DOBOR had abandoned the issue. Plaintiff was also of this opinion.

Subsequently, on 27 July 2007, without any advance notice to boaters or other interested stakeholders, DOBOR presented its HAR 13-233 rule change package to the Land Board. Because boaters, including Plaintiff, had received no indication that any rule changes had been prepared, or were being introduced, there were no boaters at the Land Board meeting to offer testimony spotlighting the rights violations and the many the many negative impacts the new rules would have on the boating community. In this regard, it is pointed out that (1) in past administrations DOBOR always made proposed rule changes available to boaters weeks and sometimes months in advance, and that (2), DOBOR has within its means, at virtually no cost, the ability to notify boaters of such vital matters of interest through their monthly billing statements (as with the questionnaire), and through announcement at regularly held harbor meetings. Such announcements by DOBOR, in fact, is one of the principal reason such meetings are held in the first place.

At the Land Board Meeting of the 27th of July 2007, according to the minutes of that meeting, DOBOR sought and received permission to move forward with the rule change package by taking them to public hearings pursuant to HRS Chapter 91. In obtaining this approval, however, DOBOR willfully misled the Land Board in several crucial respects: (1) It lied when it told the Land Board that *60% of the Ala Wai's boaters approved* of the proposed changes. Indeed, as related above, boaters had no idea that the rule changes had even been drafted, much less of any of the pernicious provisions it might contain, inter alia, to deprive Plaintiff and other boaters of property and due process rights. As described above, the actual approval rate was only 12%, not 60%, and (2), that low approval rate was only for a vague, undefined suggestion of some kind of "controlled parking," certainly not for commercialized parking throughout the Harbor, or rule changes implementing arbitrary and capricious fee increases and Harbor access restrictions deleterious to Plaintiff's enjoyment and use of their property interests as slip-holders. DOBOR further corrupted the Land Board's deliberative processes by misinforming it in a number of other important respects prior to its vote. These will be enumerated and described in detail due course.

On 19 December 2007, the HRS Chapter 91 public hearings were held on Oahu with more than 80 people in attendance. Approximately 52 of them offered oral and/or written testimony. All testimony received by the Department that night was in opposition to the rule change package; none

supported it. Subsequent newspaper accounts revealed that public opposition on 28 December 2008, at the Maui hearings was also unanimous.

On the morning of 10 January 2008, the package was re-heard by the Small Business Regulatory Review Board. In discussion following testimony, the Board's Chairperson initially *recommended that the Package be held* inasmuch as it appeared that businesses around the Harbor had not been adequately apprised of its existence or of the public hearings. Because of concerns over setting an awkward precedent in taking remedial action, however, the Board ultimately decided to pass the package, but with a *written caveat* to Governor Lingle, recommending that in deciding whether or not to sign it, she take into consideration the considerable public opposition it had generated.

On 25 January 2008, despite obvious, universal public opposition and all the testimony received in opposition the rule change package, the Department brought it once again before the Land Board, asking approval to send it on to the Governor via the AG, IAW Chapt. 91 HRS. Contrary to the provisions of HRS Chapt. 91, however, the package had been significantly modified between the time it was approved by the Governor for public hearings and its presentation to the Land Board on January 25th. Moreover, in making its presentation to the Land Board, DOBOR again misrepresented critical facts essential for the Board to reach a fair and unbiased decision as to the Package's merits and deficiencies. DOBOR in its presentation to the Board, for example, minimized, distorted, and misrepresented the nature and extent of the testimony offered by the public at the public hearing on Oahu (the largest) and it further misrepresented other facts and circumstances critical to the Board's decision making duties and proper functioning. These distortions and misrepresentations will be enumerated and further described in due course.

In addition to the foregoing misfeasance, all leading to a miscarriage of the rulemaking process and of due process rights under the Constitution, Chapter 91, HRS and other HAPA-related statutes and Administrative Rules, the package itself contains provisions some of which are intrinsically unlawful and, if signed by the Governor, would be injurious to Plaintiff and other harbor stakeholders. These include, but are not necessarily limited to:

- (1) a 1500% parking fee increase for slip-holders;
- (2) establishment of commercialized parking throughout the Harbor to be operated by a concessionaire;
- (3) charging boaters' guests, visitors and crew members, commercial rate parking fees;
- (4) limiting parking from 72 hours to 24;
- (5) raising parking meter rates and stall parking to unspecified levels;

- (6) abrogating existing rules which limit DLNR/DOBOR's discretionary power and which currently provide important safeguards against Departmental abuse of discretionary power;
- (7) establishing new rules allowing DLNR/DOBOR to arbitrarily dictate the use of the Harbor's parking resources without Land Board involvement or any need for public input.

On 25 January 2008, despite overwhelming public testimony against the Package, and despite the fact that the package had been significantly modified since previously approved by the Governor, the Land Board voted to approve it. At the conclusion of this portion of the meeting (Item J-2), Plaintiff rose to address the Chairperson and requested a Contested Case Hearing. Member timothy Johns, seated to her right, acknowledged the request and affirmed that it would be made part of the record. Hearing the request, DOBOR Administrator, Mr. Edward Underwood, handed the Plaintiff the Contested Case request form which is submitted herewith.

- 12 The relief or remedy to which you seek or deem yourself entitled:
- (1) Cancellation of the present 13-23 rule change process and withdrawn of the package;
 - (2) The process to begin *de novo*,
 - a. taking full and careful account all public testimony thus far received, both at the legally required public hearings and at BLNR meetings;
 - b. correcting the legal shortcomings cited herein above;
 - c. and with DOBOR being directed to formulate the new rule change package in consultation with representatives of the various affected user groups

(If there is not sufficient space to fully answer any of the items above, use additional sheets of paper.)

The above-named person hereby requests and petitions the Board of Land and Natural Resources for a Contested Case hearing in the matter described above.

Dated: 4 February 2008

By: s/ [Signature]
Bruce M. Middleton (Petitioner/Plaintiff)

BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

RECEIVED
08 FEB -8 P3:44

1. Name: **Janet Mandrell (Petitioner/Plaintiff) Phone 808.723.1947 Fax N/A**
2. Address: **1747 Ala Moana Blvd #4 Honolulu, HI 96815**
Email Address: **queenofhearts@hawaii.rr.com**
3. Attorney:(if any) **self**
4. Address: **N/A**
5. Subject Matter: **Hawaii Administrative Rule (13-233) changes and related DLNR/DOBOR actions, Violation by DLNR of petitioner's due process rights under State Constitution and laws; harmful impact of petitioner's property and recreational interests in Ala Wai Harbor and Hawaii small boat harbors statewide**
6. Date of Public hearing/BLNR Meeting:
 1. Public Hearings 19 December 2007 through January 2008
 2. BLNR Meetings on 27 July 2007 and 25 January 2008
 3. DOBOR community monthly meetings at Hawaii Yacht Club
8. Legal authority under which hearing, proceeding or action is being made:
 - (A) HRS Chapter 91
 - (B) HRS Chapter 343
 - (C) DLNR Hawaii Administrative Rules under Title 13, Sub-Title 1, specifically 13-1-29 and related sections
 - (D) case law related to decisions of the Supreme and Appellate Courts of the State of Hawaii.
8. Nature of your specific legal interest in the above matter, including tax map key of property affected:
 - (A) **Property and recreational interests as slip and parking permit holder, Slip 412, Ala Wai Small Boat Harbor, Honolulu, HI, TMK 2-3-037: 012**
 - (B) **Violation of constitutional right to due process both as an individual and as member of a specifically afflicted class or group holding a DLNR/DOBOR slip permit , automobile parking permit, member of Hawaii Yacht Club**
9. Specific disagreement, denial or grievance with the above matter: That in terms of both process and substantive issues:

The Division of Boating and Ocean Recreation (DOBOR) distorted and exploited the public participating process and administrative rule making process under the disguise of addressing complaints

regarding parking problems in small boat harbors, particularly Ala Wai Small Boat Harbor. And used the opportunity only to seek additional revenues and not address any other parking issues.

Some Land Board members assumed they were in an untenable position of creating an expensive and lengthy delay towards developing parking plans at any boating facilities if they did not pass the rule change package, as written. During the confusion of some board members and misstatements of facts, several procedural errors were made. Therefore, the Land Board voted and passed an agenda item based on distorted and erroneous information.

10. Outline of specific issues to be raised: In addition to those issues above, the following the issues are to be raised:

- (A) DOBOR practices in planning and maintenance for boating facilities and its' impact on the users, surrounding community
- (B) DOBOR public participation process
- (C) The cumulative effects of DOBOR's actions in AWH and the negative impacts on the average citizen ability to enjoy their recreational public land.

11. Outline of basic facts:

- 1. DLNR / DOBOR Oahu District manager had formed a stakeholder committee in late 2006 for the purpose of planning. It was dissolved after only 2 meetings, when it was discovered that a DOBOR representative was not chairing the committee.
- 2. DOBOR has implemented 2 other parking plans / actions in AWH and in other facilities without any study of the site(s) in question, develop criteria or goals or proper public input (or Land Board approval) creating great hardship for boaters and members of the Hawaii Yacht Club and other stakeholders.
- 3. DOBOR'S HAR parking package contained references or linkages to unspecified Honolulu City and County fees and therefore vulnerable to legal challenge on this merit alone and furthermore their benchmark for the fees were unjustified, capricious, downright peculiar and contrary to established practices
- 4. DOBOR's arbitrary decision to not consider public opinion in any meaningful way from the 2007 - 08 public hearings throughout the state is a violation of case law regarding public hearing process.
- 5. DOBOR's single question survey to the AWH permittee was deceptive but became the foundation of DOBOR's argument for the parking plan as reported in the media, to the Land Board and other venues.

6. DOBOR's presentation at the Land Board led to the members confusion, misstatement of facts and procedural errors to improperly approve the 25 January 2008.
7. Mr. Bruce Middleton's petition for a contested case hearing (attached) contains the facts and issues as should be considered as part this petition.

12 The relief or remedy to which you seek or deem yourself entitled:

- (1) Cancellation of the present 13-23 rule change process;
- (2) The start over the rule-making process to
 - (A) include a eye-catching notice in 2 monthly billings statements prior to new public hearing. Notices posted at 2 or more high foot trafficked spots and comfort stations doors at each small boating facility 30 days in advance of the public hearings
 - (B) begin taking full and careful account all public testimony thus far received, both at the legally required public hearings and at BLNR meetings;
 - (C) correcting the legal shortcomings cited herein above;
 - (D) and with DOBOR being directed to formulate the new rule change package in consultation with representatives of the various affected user groups

(If there is not sufficient space to fully answer any of the items above, use additional sheets of paper.)

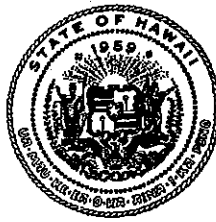
The above-named person hereby requests and petitions the Board of Land and Natural Resources for a Contested Case hearing in the matter described above.

Dated: 8 FEB 08

By: 
(Plaintiff)

Attachment: Bruce Middleton Petition for Contested Case Hearing

LINDA LINGLE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

LAURA H. THELEN
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

RUSSELL Y. TSUI
FIRST DEPUTY

KEN C. KAWAHARA
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

March 13, 2008

Mr. Bruce Middleton
Ala Wai Marina Community Association
1848 Kahakai Drive, No. 903
Honolulu, Hawaii 96814

Subject: Denial of Petition for a Contested Case Hearing Relating to the Proposed
Amendments to Section 13-233, Hawaii Administrative Rules

Dear Mr. Middleton:

We are in receipt of your Petition for a Contested Case Hearing Regarding DLNR's Proposed Rule Amendments to HAR §13-233 in which you requested a contested case hearing arising out of a rule making proceeding.

A contested case hearing is one where the "legal rights, duties, or privileges ... are required by law to be determined after an opportunity for agency hearing." HRS §91-1(5). The phrase "required by law" "embraces both constitutional [and] statutory law." Bush v. Hawaiian Homes Comm'n, 76 Hawai'i 128, 134-35, 870 P.2d 1272, 1278-79 (1994).

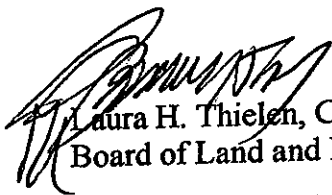
Rule making does not affect the rights, duties, or privileges of particular persons that would require a contested case hearing to be held. "Rule-making is an agency action governing the future conduct either of groups of persons or of a single individual; it is essentially legislative in nature, not only because it operates in the future, but also because it is concerned largely with considerations of policy." In re Hawaiian Electric Co., Inc., 170 P.U.R.4th 395, 466, 918 P.2d 561, 566 (1996). "Adjudication, conversely, is concerned with the determination of past and present rights and liabilities." Id. "What distinguishes legislation from adjudication is that the former affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it; while adjudication operates concretely upon individuals in their individual capacity." Id., 170 P.U.R.4th at 466-7, 918 P.2d 561, 568-9.

As you can see from these definitions, a rule making procedure is by its nature not subject to a contested case hearing. Rule making does not affect the legal rights, duties, or privileges of

EXHIBIT C

individuals but is instead a vehicle for legislative like policy making by an administrative agency. A contested case hearing is not appropriate at this time. Accordingly, your petition for a contested case hearing is hereby denied.

Sincerely,

A handwritten signature in black ink, appearing to read 'Laura H. Thielen', is written over the printed name.

Laura H. Thielen, Chairperson
Board of Land and Natural Resources

LINDA LINGLE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

LAURA B. THIELEN
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

RUSSELL Y. TSUJI
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CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

March 12, 2008

Ms. Janet Mandrell
1747 Ala Moana Blvd., #4
Honolulu, Hawaii 96815

Subject: Denial of Petition for a Contested Case Hearing Relating to the Proposed
Amendments to Section 13-233, Hawaii Administrative Rules

Dear Ms. Mandrell:

We are in receipt of your Petition for a Contested Case Hearing Regarding DLNR's Proposed Rule Amendments to HAR §13-233 in which you requested a contested case hearing arising out of a rule making proceeding.

A contested case hearing is one where the "legal rights, duties, or privileges ... are required by law to be determined after an opportunity for agency hearing." HRS §91-1(5). The phrase "required by law" "embraces both constitutional [and] statutory law." Bush v. Hawaiian Homes Comm'n, 76 Hawai'i 128, 134-35, 870 P.2d 1272, 1278-79 (1994).

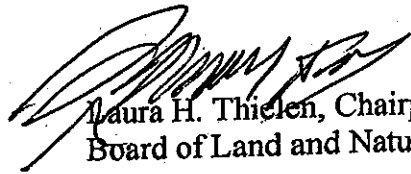
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As you can see from these definitions, a rule making procedure is by its nature not subject to a contested case hearing. Rule making does not affect the legal rights, duties, or privileges of individuals but is instead a vehicle for legislative like policy making by an administrative

EXHIBIT D

agency. A contested case hearing is not appropriate at this time. Accordingly, your petition for a contested case hearing is hereby denied.

Sincerely,

A handwritten signature in black ink, appearing to read 'Laura H. Thielen', is written over the printed name.

Laura H. Thielen, Chairperson
Board of Land and Natural Resources

RECEIVED

MAR 28 AM 10:05

DEPT. OF LAND & NATURAL RESOURCES
STATE OF HAWAII**Bruce M. Middleton**1848 Kahakai Dr. #903
Honolulu HI 96814
(808) 941-0875 fax & voice

March 23, 2008

Ms. Laura H. Thielen
Chair, Board of
Land and Natural Resources
Kalanimoku Building
1151 Punchbowl St.
Honolulu, HI 96813**Subject: Denial of 4 February 2008 Petition for a Contested
Case Hearing under HRS §91 (HAPA)**

Dear Ms. Thielen,

Your letter of March 13, 2008, postmarked March 18th, is received, in which you, acting on your own authority, deny the above-captioned petition for a contested case hearing.

Unfortunately, I find your letter insufficient in a number of respects:

First, my petition was submitted to the BLNR for consideration and action, not to you alone. I believe that only the Board as a whole has the authority to reject such petitions for cause and that in doing so unilaterally, you have wrongfully exceeded your authority.

Second, with the exception of the *Bush v. Hawaiian Homes* case, which supports my position, you fail to cite any competent legal authority upon which to rationally base such a denial.

Third, your denial appears to be rooted in two rather whimsical and capricious constructs, neither of which has any relevant foundation in statutory, common, or case law, to wit:

1. "Rule making does not affect the rights, duties, or privileges of particular persons that would require a contested case to be held," and
2. "...a rule making procedure is by its nature not subject to a contested case hearing."

The first assertion is absurd on the face of it, and the second seems to have been plucked out of thin air for purposes not yet entirely clear.

DLNR

☐ COORDINATE with _____

____ Final reply for Gov. slg. ☒ Follow up

____ Direct reply (cc/bc: Gov.) ☒ Submit copy of response

____ Appropriate action ☐ Keep enclosure(s)

____ FYI/file ☐ Return enclosure(s)

____ Comment/Recommendation _____

____ Other _____

Due _____

Please refer to: APR - 8 2008

08, 0327206

Fourth, our state courts have long held that contested cases are integral to the hearing process as prescribed by HRS §91 (HAPA) and that "Where an administrative agency seeks to promulgate a rule, it must consider the views of interested persons," *Aguilar v. Hawaii Housing Authority*, 55 Haw. at 487-88, 522 P.2d at 1262; for the "powers of government should not be used in a manner giving an appearance of being arbitrary." *In re Western Motor Tariff Bureau, Inc.*, 53 Haw. 14, 19, 486 P.2d 413, 416 (1971).

By this letter you are requested to set aside your rejection of my petition of February 4, 2008, and to present it to the Land Board for consideration and decision making at one of its regular Oahu meetings. Otherwise, please regard this letter as a petition to the BLNR in accordance with HAR §13-1, for a declaratory ruling concerning:

a. The legitimacy of your having unilaterally rejected my petition of February 4, for a contested case, and


b. The validity of your legal rationale for rejection as set forth in your letter of the 13th, inst.

Finally, you say in the last paragraph of your letter, "A contested case hearing is not appropriate at this time." Would you please advise as to (1), whether this means that the Department/BLNR has not yet rendered its final decision in this matter, and (2), what you would consider in this instance to be an appropriate time for a contested case hearing.

I would appreciate it if a copy of this letter, together with applicable backup, could be provided to each Board member, or, if you prefer, I will be happy to provide them myself; just let me know.

Your prompt reply in this matter will be appreciated.

Sincerely,


Bruce M. Middleton
Petitioner

Copy to:

Governor Linda Lingle
Attorney General Mark Bennett
Senator Gordon Trimble
Representative Tom Brower